

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

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**'OCT 16 1995**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

In the matter of

Policies and Rules Concerning  
**CHILDREN'S TELEVISION PROGRAMMING**

Revision of Programming Policies  
for Television Broadcast Stations

**MM Docket No. 93-48**

**DOCKET FILE COPY ORIGINAL**

**COMMENTS OF  
THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.**

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The following comments are submitted by the Association of Independent Television Stations, Inc. ("INTV"), in response to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding.<sup>1</sup> INTV is a non-profit, incorporated association of broadcast television stations unaffiliated with the ABC, CBS, or NBC television networks.<sup>2</sup> INTV's member stations will be affected directly by the Commission's action in this proceeding. Therefore, INTV must resist the more strident calls that their programming discretion be usurped by government and supplanted by government edict.

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<sup>1</sup>FCC 95-143 (released April 7, 1995)[hereinafter cited as *Notice*].


<sup>2</sup>"Independent" stations as referred to herein include not only truly independent stations, but also local television stations affiliated with the three emerging networks, Fox, UPN, and WB.



This proceeding is near degenerating into a food-fight like brawl over whether broadcast television licensees or the government should determine how children might best be served by broadcast television. Now the Commission, having compiled a bulging record in this proceeding, must separate the wheat from the chaff and make a reasonable judgment as to its course of action. Like good bread, the Commission's decision must be formed of the wheat of the record, discarding the chaff. It must be leavened with the yeast of reason and common sense, displacing the self-righteous rhetoric which has characterized every side of the debate for over 20 years. In the final analysis, the passions must give way to reason. The Commission may no more determine that an action is desirable simply because it is motivated by the desire to help children than it may turn a blind eye to the Act in the name of protecting an absolutist view of the First Amendment.

INTV urges the Commission to resist the temptation to embrace either extreme and approach its decision with a heightened consciousness of its obligation to avoid the arbitrary and eschew caprice. The Commission instead must set its stance firmly in its statutory mandate, review the evidence unobscured by the smoke of a fiery debate and undistorted by the tilted mirrors of preconception. It must employ not the emotion of the moment, but the balm of logic and smooth elixir of common sense.

To that end, INTV places before the Commission at the outset several considerations of which the Commission never ought lose sight in its deliberations.



- **This process must begin with a keen appreciation of the legal foundation of the Commission's authority -- the Children's Television Act of 1991.<sup>3</sup>**

Congress by no means was stingy with its grant of authority to the Commission. Yet, Congress had definite and unambiguous notions of how the Commission was to effectuate its intent. The Commission hardly was extended *carte blanche* to place a regulatory choke hold on the programming decisions of broadcast licensees. The Commission, therefore, enjoys some latitude, but only within the confines of Congressional intent.

The Commission's respect for both the largesse and limitations of its statutory mandate is especially compelling in the case of the act. Despite years of contention, the act represents a concerted effort by parties with vastly differing viewpoints. Congressman Edward Markey, primary sponsor of the bill in the House stated:

[T]he national television networks, the National Association of Broadcasters, the Association of Independent Television Stations, and numerous public interest groups, particularly Action for Children's Television under the tireless leadership of Peggy Charren, deserve credit for this legislation.<sup>4</sup>

INTV wholeheartedly supported the Act. As an INTV board member testified before Congress in 1993:

The INTV board voted unanimously to support the Children's Television Act of 1990. INTV worked with this Subcommittee and its counterpart in the Senate to get the legislation passed. We continue to support the goals of this important statute.<sup>5</sup>

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<sup>3</sup>P.L. 101-437, 104 Stat. 996, §§102 -103 (1990) (codified in U.S.C. §§303a and 303b) [hereinafter cited as "the Act"].

<sup>4</sup>136 CONG. REC. H 5245-46 (1990).

<sup>5</sup>Testimony of Brooke Sectorsky, Vice President and General Manager, WUAB-TV, Cleveland, Ohio, before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, U.S. House of Representatives (March 10, 1993) at 1 [hereinafter cited as "Sectorsky"], a copy of which is attached as Exhibit 1 to the Comments of the Association of Independent Television Stations, Inc., MM Docket. No. 93-48 (filed May 7, 1993) [hereinafter cited as "INTV 1993 Comments"].

This common commitment to children's television produced an effective vehicle for reform of children's television regulation, but one mindful that regulation easily can overreach and in the end impose costs far in excess of its intended benefits.

- **No children's program, now matter how beneficial it may be, is of the slightest value unless children watch it.**

As acknowledged by the Commission's chairman at the Commission's *en banc* hearing last year:

As a former teacher and as a current parent, I certainly agree with anyone who may assert that when it comes to kids, you have to reach them in order to teach them.<sup>6</sup>

Peter Walker, vice president and general manager of WGN-TV, Chicago, similarly observed that same day that:

[Y]ou cannot educate and inform children if they will not watch. Also, you cannot force children to watch something they do not like.<sup>7</sup>

Thus, anything the Commission might determine to do in this proceeding will be a hollow gesture and delusion *vis-a-vis* promoting the welfare of children unless children actually watch the programs Congress sought to engender in the Act.

- **The Commission might mandate quantity, but everyone admits the Commission in no way could mandate -- and doubtfully even could define -- quality.**

As CBS's Jonathan Rogers told the Commission:

There is a market for quality children's educational programming on commercial broadcast television but that market is constricted by the program choices that are already available from public television, and from cable based distributors who have normal economic incentives to provide such programming. And it is a market which cannot be enlarged or satisfied by government fiat. The FCC could not regulate the quality of a television program, even if it wanted to. Nor can it require

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<sup>6</sup>Transcript of Proceedings, *En Banc* Hearing on Children's Television (June 28, 1994) at 7 [hereinafter cited as "Tr."]

<sup>7</sup>Statement of Peter Walker, *En Banc* Hearing on Children's Television, MM Docket No. 93-48 (June 28, 1994) at 5 [hereinafter cited as "Walker"].



children to watch government favored programs that meet its definition of educational.<sup>8</sup>

A Commission which hopes to encourage quality programming which children will watch, therefore, ought think twice before enshrining quantity as its overarching goal.

- **Children now confront not a broadcast marketplace, but a video marketplace inhabited by an ever-expanding array of program choices. So do broadcasters.**

Peter Walker of WGN states:

Further, for a youngster or any viewer, television is television and programming is king. Everything that is available to a viewer in the home is competition. Cable networks, such as the "Cartoon Channel," "TNT" and "USA," which are not subject to the 1990 Children's Television Act, routinely broadcast kids animated entertainment programs. You cannot look at broadcasting in a void. The best channel surfer in America are children. National policy should examine the entire television landscape as it exists today.<sup>9</sup>

Thus, the Commission must seek to appreciate what broadcast television stations could do best in that environment *vis-a-vis* the educational and informational needs of children.

- **Everyone seriously involved in this ongoing debate over children's programming cares deeply about children and likely just as deeply about the significance of constitutional guarantees and the rule of law.<sup>10</sup>**

No one has suggested that broadcasters are greedy, malevolent robber-barons -- and they are not. Broadcasters rank among this nation's corps of parents and, whether as parents or simply

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<sup>8</sup>Tr. at 164-5.

<sup>9</sup>Walker at 5.

<sup>10</sup>INTV does remain somewhat mystified that the Commission has failed to mention in any prominent fashion one enormously influential constituency -- advertisers. As Nickelodeon's Geraldine Laybourne told the Commission:

You know, one of the constituents that's been largely left out of this conversation today is the advertiser. And I believe that the advertiser is the partner that we need to effect good children's television.

Tr. at 210-211.





as citizens of their communities, share the fervent hope that the children now watching their stations will emerge as best-educated and most enlightened generation to pursue life on this fragile planet. Likewise, no one has suggested that those who zealously espouse the interests of children are champions of tyranny and oppression over the world's most effective and efficient medium of mass communications. They just want that medium's enormous power to be focused on the educational and informational, as well as the entertainment, needs of their children. As the chairman observed at the close of the *en banc* hearing:


I am enormously impressed by the harmony among programmers and broadcasters and academics and entertainers here today. I haven't heard any broadcasters shirk the duty to inform and educate children. I have heard all of them welcome it and desire to better fulfill it. I haven't heard anyone say that broadcasters are not performing this duty at all, but, rather people are talking about how they can do it better and how much they might be able to do so. We actually have tremendous agreement on important first principles and the issues that we are all discussing showed, it seems to me, on all sides great compassion and great caring for our children. This is a credit to our country and a credit to everyone who is, who is here today. And in a real way broadcasters are helping perpetuate the American dream and I congratulate you all for that.<sup>11</sup>

The debate, therefore, involves no contention over ends, but only over means, and, even there, everyone seeks the same result: Creative programming which will excite, educate, and enlighten children.

Mindful of these tenets itself, INTV has formulated a position, as set forth herein, which is designed to maintain a regulatory environment most conducive to the best practicable broadcast television service to this nation's children.

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<sup>11</sup>Tr. at 225-226.



[REDACTED]

No immediate regulatory prod is necessary to promote development and broadcast of programming responsive to the educational and informational needs of children. The past five years have witnessed a significant expansion in the supply of such programming and a concomitant increase in the amount of such programming exhibited on broadcast television stations.

INTV's most recent survey confirms this. Independent stations on average broadcast over three and a half hours per week of regularly scheduled educational and informational programming for children. This regularly scheduled programming is supplemented by nearly 40 minutes per week of short segment and interstitial programming, as well as numerous specials -- an average of nearly one hour per station per quarter. The overwhelming majority of this programming was broadcast at times when children are watching television.

Moreover, the increasing availability of educational and informational programming and material on nonbroadcast media (ranging from cable television to the Internet) and the continuing availability of long-acclaimed educational and informational programming for children on public television erases any lingering doubt that children suffer no dearth of opportunity to find stimulating educational and informational television programming in their homes. In short, no more have broadcasters shirked their responsibilities as licensees and trustees than have new media entrepreneurs ignored the opportunity to offer children new avenues of entertainment, education, and information. Therefore, whereas no one would deny the significance of the Act in prompting an increase in broadcast television programming, no one might now suggest that any rational basis exists for finding a short supply of educational and informational programming for children or any sort of market failure.

[REDACTED]

This hardly is to say the Commission should claim victory (although well it might), fold its tent, and redeploy all its energy to its *deregulatory* agenda. The Commission retains an obligation to assure the continued success of the Act and ought continue to monitor television stations' children's programming performance. INTV suggests that the Commission set a formal review of the results of its monitoring efforts at the close of the next television renewal cycle. The Commission would develop a sound record for evaluation of whether further action might be called for -- and its attention to the issue in no way would be lost on broadcast licensees. Big sibling (*nee*' big brother) would be watching!

INTV endorses and encourages no further action by the Commission at this time. Nonetheless, if the Commission were to be drawn farther down the inherently perilous path toward outright dictation of broadcast station program content, it should step gingerly. This is not just an acknowledgement of the bill of rights. Much more it is a concern that unfettered program creators and ever more sophisticated video consumers know more about programming that excites, educates, and informs children than any cadre of government regulators, as well-intended they undoubtedly would be. Although INTV submits no legal, logical, or supportable premise exists for further Commission action, INTV is well aware that the Commission might be swayed to adopt more intrusive regulations. Therefore, INTV submits several ideas, which, while expressly offered as neither recommendations nor even suggestions, would be less likely to do more harm than good.

First, the Commission might make a modest change in the definition of so-called "core" programming. The definition would include specials, short-segment programming, and any programming which "furthers the child's intellectual/cognitive or social/emotional needs," *provided* the station specifies the educational objective of the program in its children's programming report, the program is aired between the hours of 6:00 a.m. and 11:00 p.m., and/or the program is



identified as educational children's programming at the time it is aired and in instructions for listing it provided by the licensee to program guides.

Second, the Commission might issue a policy statement delineating the various station practices and activities which the Commission would consider in determining whether a station had complied with the act. Such practices might include the several of the Commission's proposals (*e.g.*, supplying information to publishers of television listings indicating which programs were responsive to the educational and informational needs of children, displaying icons during such shows) and some of those offered by other participants in this proceeding (*e.g.*, formation of local advisory committees or consultation with local educators on programming). The adoption and implementation of these practices by a station would be considered in the Commission's overall evaluation of the station's compliance with its obligations under the Act.

Third, as part of the policy statement, the Commission might establish a "safe harbor" policy under which stations which broadcast two hours of "core" programming per week or four hours of "core" and non-core programming per week are considered to have complied with the Act's programming requirements.<sup>12</sup> Whereas INTV sees no need for any quantitative rule, guideline, or policy as a means of promoting broadcast of more educational and informational programming for children, such a policy would add transparency to the Commission's review of renewal applications and provide stations the opportunity to seek a safe harbor. Furthermore, a safe harbor policy as envisioned by INTV leaves a wealth of flexibility for stations to focus on quality and innovation rather than plodding compliance with a quota-like requirement.

INTV views these ideas as the outermost extreme of regulatory actions which *might* be beneficial rather than costly *vis-a-vis* the Act's goal of promoting broadcast of programming

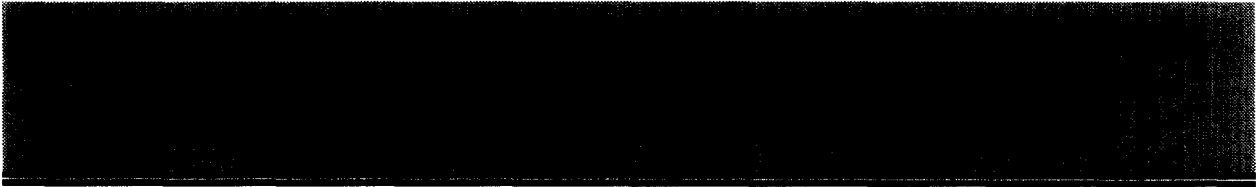
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<sup>12</sup>The amounts specified by INTV are based on the definition of core programming also suggested herein by INTV.

responsive to the educational and informational needs of children. No further regulation is remotely necessary or demonstrably desirable. In particular, no quantitative *requirement* should be adopted. Any such requirement, limited inherently by its sole focus on quantity would contravene unambiguous Congressional intent. Moreover, it would be far more likely to shatter the widespread hope that broadcast television thrive as the home of children's programming which is exciting, educating, enlightening and informative.


Therefore, the Commission must refrain from counterproductive measures which defy Congressional intent -- and common sense.





Much of the angst among those dissatisfied with the performance of the broadcast industry is rooted in the belief that stations are providing an insufficient quantity of programming responsive to the educational and informational needs of children. They also bemoan the inclusion in station reports of some programming of dubious educational value. This has led to a small, but resounding chorus calling not only for an outright requirement that stations broadcast as much as seven hours per week of so-called "core" programming responsive to the educational and informational needs of children, but also for a tightly constricted definition of just what constitutes core programming. Such proposals are floated in the Commission's *Notice*.

INTV respectfully submits that such proposals are premised on a retrospective -- and inaccurate -- view of the realities of the broadcast and video marketplaces. They ignore the blossoming of educational and informational children's programming on broadcast television since passage of the Act. The program production and syndication markets now have responded with a growing supply of such programming. Using this expanding program supply and often producing their own programs, independent stations have scheduled more educational and informational children's programming and almost invariably at times when children are likely to watch them. Moreover, when this increase in educational and informational children's programming by commercial broadcasters is viewed in the context of the noncommercial broadcast and commercial nonbroadcast video services, no child or parent has any basis for complaining that any shortfall of educational and informational children's programming exists.



Therefore, the Commission's task at this point is to maintain the current level of "encouragement" to stations and continue to monitor station performance under the Act.<sup>13</sup>

**A. Independent Stations Provide a Substantial Amount of Quality Programming Designed to Respond to the Educational and Informational Needs of Children.**

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Independent stations continue to perform admirably under the Act. INTV has replicated its previous survey of independent stations.<sup>14</sup> This latest survey shows that:

- Independent stations broadcast on average one half-hour of regularly-scheduled, standard length educational and informational programming *per day* or 3.77 hours per week.<sup>15</sup>
- Independent stations broadcast an additional 37 minutes of short-segment and interstitial educational and informational programming per week;<sup>16</sup>
- Independent stations broadcast one hour of special programming responsive to the educational and informational needs of children each quarter;<sup>17</sup>
- Nearly 97 per cent of regularly-scheduled, standard length educational and informational programming is scheduled at or after 6 a.m., and 87.5 per cent is broadcast at or after 7 a.m.;<sup>18</sup> and

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<sup>13</sup>In no sense does INTV define "encouragement" as regulation by raised eyebrow or even jawboning. INTV simply acknowledges that the genuine and serious obligation of stations to provide educational and informational children's programming must remain an integral part of the Commission's administration of the broadcast licensing process and suffer no benign neglect or indifference.

<sup>14</sup>Association of Independent Television Stations, Inc., *1995 Status Report on Children's Educational Programming*, attached hereto as Exhibit A [hereinafter cited as *1995 Status Report*].

<sup>15</sup>*1995 Status Report* at 11; "Regularly scheduled" programming was defined to include only programming of 30 minutes or longer duration. *Id.* at 10.

<sup>16</sup>*Id.* at 16.

<sup>17</sup>*Id.* at 14.

<sup>18</sup>*1995 Status Report* at 12.

- No special program was broadcast before 6 a.m., and 93.1 per cent were broadcast at 7 a.m. or later.<sup>19</sup>

These results reconfirm a dramatic and continuing improvement in the amount of educational and informational children's programming available on independent stations since the Act was passed.<sup>20</sup>

The Commission may not dismiss these results. First, erroneous inclusion of programs which fail to qualify was a temporary phenomenon which may have tainted earlier survey results. Stations now are much more aware of the nature of programming which qualifies as educational and informational children's programming. Misclassifications are correspondingly rare. Thus, the results suffer no comparable charge that they are unreliable.<sup>21</sup>

Second, the Commission has stated that it relies on the reasonable, good faith judgments of licensees in assessing whether programs meet the definition of educational and informational children's programming. If the Commission is to second guess any such judgment, it ought expose and explain its decision. Otherwise, those who conduct and analyze surveys always will remain subject to the Commission's whim and caprice in terms of the evaluation of their results.<sup>22</sup>

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<sup>19</sup>1995 *Status Report* at 14.

<sup>20</sup>Of course, independent stations are not unique in their response to the educational and informational needs of children. Ducey, Richard V., & Fratrik, Mark R., National Association of Broadcasters, *The 1990 Children's Television Act: Its Impact on the Amount of Educational and Informational Programming*, submitted as Attachment 1 to the Comments of the National Association of Broadcasters, MM Docket No. 93-48 (filed July 15, 1994).

<sup>21</sup>See 1995 *Status Report* at 12 for a list of programs typically cited by stations.

<sup>22</sup>INTV is not inviting the Commission to publish a list of, as the syndicators say, "FCC friendly" programs. However, in the context of a rulemaking proceeding the rejection of relevant and probative evidence requires some explanation. INTV notes in this regard that the Commission relegated INTV's syndication study to a footnote in its *Notice*, but apparently made no effort to vet INTV's list of programs included in the study.



INTV is confident that the results of its survey are reliable and certainly as reliable as any other study provided to the Commission thus far in this proceeding.

Third, the Commission also has been reluctant to rely on the results of previous surveys in light of a potential response bias.<sup>23</sup> This concern, however, is speculative. Furthermore, the Commission possesses a complete record of stations' performance during the last television renewal cycle. INTV, unlike the Commission, has no ability to compel stations to respond to surveys.

Finally, INTV's results are consistent with results of other surveys. For example, INTV's syndication survey, which is subject to no response bias, showed an enormous increase in clearances for syndicated programs responsive to the educational and informational needs of children.<sup>24</sup> These analyses reveal that the number of clearances on independent stations has increased from 219 in 1990 to 677 in 1995.<sup>25</sup> All programs were broadcast after 6 a.m., and over 66 per cent were broadcast after 7 a.m.<sup>26</sup> This survey also is immune from subjective inclusion of questionably educational programming.<sup>27</sup> Similarly, INTV's survey in 1994 also found substantial increases in the amount of educational and informational programming on independent stations.<sup>28</sup>

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<sup>23</sup>*Notice* at ¶18.

<sup>24</sup>*1995 Status Report* at 4.

<sup>25</sup>*INTV 1995 Status Report* at 7; Across all stations, independent and affiliate, the number of clearances have increased from 570 in 1990 to 1840 in 1995. *Id.* at 6.

<sup>26</sup>*Id.* at 7.

<sup>27</sup>*See Walker* at 4; *1995 Status Report* at 4.

<sup>28</sup>*See INTV Status Report on Children's Television*, which appears as Appendix A to the Reply Comments of the Association of Independent Television Stations, Inc., MM Docket. No. 93-48 (filed July 15, 1994) [hereinafter cited as "INTV 1994 Reply"].

The performance of numerous individual stations further exemplifies independent stations' commitments to serving the educational and informational needs of children.<sup>29</sup> Linda Cochran, vice president and general manager of WSYT-TV, Syracuse, New York, testified last year before Congress:

In the first quarter of 1994, we broadcast eight children's programs directed at their educational and informational needs. Every weekday, we broadcast *XUXA* at 9 a.m., *Romper Room* at 2 p.m., and *Animaniacs* at 4 p.m. On Saturday, my station broadcasts *Pick Your Brain* at 6 a.m., the *What's Up Network* at 7:30 a.m. and *Where in the World is Carmen Sandiego* at 11:30 a.m. On Sundays, WSYT airs *Adventures in Wonderland* at 7 a.m. and *Bill Nye, the Science Guy* at 7:30 a.m.<sup>30</sup>

She also noted that local independent stations are producing regularly scheduled educational and informational programs for children:

In addition to specials, stations are beginning to develop regularly scheduled children's programs. For example, KCOP in Los Angeles broadcasts *LA Kids* every week. WPTY in Memphis broadcasts the *Joe Cool Show*. KPTV in Portland airs teen oriented show *Smith's High 5* every Saturday morning.<sup>31</sup>

Thus, independent stations have provided children with various species of the genus educational and informational programming.

In sum, independent stations (and all broadcast networks and stations) have responded to the mandate of the Act and are continuing in their efforts to provide a meaningful contribution to the array of educational and informational children's programming now available to the children of this country. As stated by Commissioner Quello "[A]n objective view of the complete record will

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<sup>29</sup>See, e.g., Sectorsky at 15 *et seq.*; Walker at 1; Testimony of Linda Cochran, Vice President and General Manager, WSYT-TV, Syracuse, New York, before the Subcommittee of Telecommunications and Finance, United States House of Representatives (June 10, 1994) at 2 *et seq.* [hereinafter cited as "Cochran"], a copy of which is attached hereto as Exhibit B.

<sup>30</sup>Cochran at 5.

<sup>31</sup>Cochran at 12; see also 1995 Status Report at 14.

indicate that broadcasters already are doing an extensive job of airing educational and informational programming.”<sup>32</sup>

**B. The Program Production and Syndication Markets Are Providing an Expanding Supply of Programming Designed to Meet the Educational and Informational Needs of Children.**

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If one perceived a stutter-step in the initial response of broadcast stations to their obligations under the Act, the explanation now is well understood. When the Act became effective, stations simply could not march down the aisle of the local program supermarket and pick a selection of titles off the shelf. Once the act was passed, demand was instant, but supply was minimal. Now, supply no longer trails demand. Producers and syndicators -- and stations -- plunged into the market.

The reality of program production, however, defied instant gratification of demand. Program development takes time. The chairman of the Corporation for Public Broadcasting, Sheila Tate testified, “[P]roducing quality children’s programming is not easy, it’s not fast, it’s not inexpensive.”<sup>33</sup> Children’s programs, no less than other genres enjoy no guarantee of success. All programs do not succeed. For example, despite substantial investment and effort, *Energy Express*, produced by WGN-TV, failed simply because “enough kids did not watch it.”<sup>34</sup> WGN’s Peter Walker testified:

*Energy Express* constituted a major initiative for WGN television. The idea was born in July of 1992...aired locally beginning in January and went to national

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<sup>32</sup>Remarks by Commissioner James H. Quello before the NAB’s Children’s Television Symposium (September 21, 1995) at 1 [hereinafter cited as “Commissioner Quello’s Remarks”].

<sup>33</sup>Tr. at 170; see also 1995 Status Report at 6, n.4 (75% of all programs fail.).

<sup>34</sup>Tr. at 179.

syndication in the fall of 1993. We spent close to a million dollars to produce 26 episodes and lost a substantial amount of money.

Our experience is instructive and that the reasons for our show's failure are not always self-evident. First, money does not always guarantee success. As one point of comparison, the budget for each episode of *Energy Express* was twice what we spend on a 3 hour Cubs baseball telecast. Production quality was first rate. In fact, the show won several awards.

Second, scheduling was not a problem. WGN, for one, aired the program at 12:30 noon on Saturdays and in most of its markets, *Energy Express* was scheduled at 7 a.m. or later.

Third, promotion, while essential to launch a show, cannot ensure long term success. *Energy Express* was promoted heavily by WGN. In addition, the show had its own feature bulletin board on the America Online service.

Fourth, advertisers were eager to see the program succeed. We took *Energy Express* to the market and had considerable success in terms of advertising sales but ultimately, when the show didn't deliver its targeted demographic, we didn't get paid. That's the way it works.<sup>35</sup>

Thus, supply hardly materializes instantly with a wave of a wand. Yet, as more programs have entered the market successfully, the supply has grown and initial shortages have been left behind in a trail of hard work by dedicated producers and stations. As Mr. Walker concluded:

*Energy Express* did not do well because enough kids did not watch it. That's the bad news. The good news is that we're committed to try again and if need be, again and again.<sup>36</sup>

Now, as the shelves have been and continue to be stocked with successful shows, the supply shortage abates.

INTV's analysis of the syndication market reveals, indeed, that the supply of educational and informational children's programming has expanded. Between 1990 and 1995, the number of syndicated educational and informational programs for children nearly tripled from eight to 20.<sup>37</sup> In

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<sup>35</sup>Tr. 178-179.

<sup>36</sup>*Id.*

<sup>37</sup>1995 *Status Report* at 6.

March, 1993, Brooke Sectorsky, then general manager of WUAB-TV, Cleveland told a Congressional subcommittee, "Two years ago, the supply of such programming was rather limited. Today the supply is expanding." He then listed *The World According to Kids*, *Zoo Life Magazine*, *The Edison Twins*, *Teen Court*, *Beakman's World*, *Real News for Kids*, *Scratch*, *Hallow Spencer*, and *Wavelength* as syndicated programs which had entered the market since the Act was passed.<sup>38</sup> Furthermore, new programs now are available to replace programs which left the market.<sup>39</sup> In short, the market is functioning -- supply is keeping pace with demand.

A final indication of the sound functioning of the market is the fact that five of the 31 most popular children's programs are educational and informational programs.<sup>40</sup>

Therefore, the market is responding to stations' demand, and the supply of educational and informational children's programming is expanding. No one has had to set any minimum requirement for stations to give impetus to this expansion of the supply of educational and informational children's programming. Supply has increased because stations demanded the programming, and stations demanded the programming because they have taken their obligations under the Act seriously from day one.

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<sup>38</sup>Sectorsky at 5.

<sup>39</sup>1995 *Status Report* at 6.

<sup>40</sup>1995 *Status Report* at 7.

**C. The Availability of an Extensive Array of Programming Designed to Respond to the Educational and Informational Needs of Children on Noncommercial and Nonbroadcast Video Program Services Assures that the Educational and Informational Needs of Children Are More Than Satisfied.**

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The Commission is fully cognizant of the development of a multimedia video marketplace within which broadcast television is a single, if unique, competitor.<sup>41</sup> Even ten years ago, the Commission, with approval of the courts, acknowledged the obvious -- that consumers no longer rely exclusively on broadcast television for programming of any sort.<sup>42</sup> Other media provide entertainment, news, sports, public affairs, and children's programming, to say nothing of a cornucopia of "niche" channels appealing to even narrower programming needs and tastes. The competitive environment in program supply has led the Commission to jettison rules based on previous perceptions that the three original broadcast networks possessed market power in the acquisition, exhibition, and distribution of programming.<sup>43</sup> Therefore, a myopic vision of the video marketplace in which only broadcasters compete and consumers select from only broadcast programming is untenable.

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<sup>41</sup>*See, e.g., Further Notice of Proposed Rule Making*, MM Docket No. 91-221, FCC 94-322 (released January 17, 1995) at ¶15 *et seq.*; *Notice of Inquiry*, CS 95-61, FCC 95-186 (released May 24, 1995).

<sup>42</sup>*In re Children's Television Programming and Advertising Practices*, 96 FCC 2d 634 (1984), *aff'd. sub nom. Action for Children's Television v. FCC*, 756 F.2d. 899, 901 (1984) [hereinafter cited as *ACT v. FCC*]; *see also* 136 CONG. REC. S 10122 (remarks of Senator Inouye) ("Under this legislation, the mix is left to the discretion of the broadcaster taking into account what other stations, including noncommercial ones, are doing in this important area.").

<sup>43</sup>*Report and Order*, MM Docket No. 94-123, FCC 95-314 (released July 31, 1995) (Prime Time Access Rule repealed effective August 31, 1996); *Report and Order*, MM Docket No. 95-39, FCC 95-382 (released September 6, 1995) (Network financial interest and syndication rule sunset advanced to September 21, 1995). INTV does wonder why the Commission would hasten to abandon rules which have assisted independent stations support their program service, including educational and informational programming for children, while examining in this proceeding way to encourage provision of more such programming.



This hardly is to suggest that broadcasters may shift their responsibilities to other media. Broadcasters do have a special obligation which they take seriously. The issue at hand, however, is how best to fine tune the regulation of children's television on broadcast stations in this competitive, multimedia milieu. In other words, what needs best can be met via broadcast programming. That judgment requires a full appreciation of the state of the video marketplace in which broadcast stations now compete.<sup>44</sup>

Educational and informational children's programming is no stranger to the video marketplace. Public television long has provided some of the most extraordinarily beneficial programming for children ever produced. Public broadcasters have told the Commission that:

For more than 30 years, providing educational and informational programming for children -- including programming targeted to pre-schoolers, and school age children for home viewing and for classroom instruction -- has been a core component of public television's mission. A whole generation of American children has grown up under the positive educational influence of *Sesame Street* and *Mr. Rogers' Neighborhood*....<sup>45</sup>

More, recently, Sheila Tate, chairman of the Corporation for Public Broadcasting, told the Commission:

Public television has an honorable history in children's education. Parents trust our programming for children to provide learning that comes to life. Programs like

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<sup>44</sup>As stated by the court in *ACT v. FCC*, 756 F. 2d. at 901:

As to cable: While that medium is not available in all areas or to all segments of the viewing community, it has a sufficiently broad and increasing presence that the Commission may appropriately consider its offerings....We also see no need for the Commission to blind itself to the contributions of noncommercial television. to be sure, Congress did not intend noncommercial broadcasting to "relieve commercial broadcasters of their responsibilities....But that does not mean that the Commission must require commercial broadcasters to pursue those responsibilities in disregard of the fact that some gaps in the public interest may have been filled by that source while other needs remain entirely unmet." [citation omitted].

<sup>45</sup>Comments of the Association of America's Public Television Stations, the Corporation for Public Broadcasting, and the Public Broadcasting Service, MM Docket No. 90-570 (filed January 30, 1991) at 4.

*Sesame Street*, *Reading Rainbow*, and *Ghostwriters* are recognized for their superior ability to educate while they also entertain.<sup>46</sup>

As Congress acknowledged in 1991, “[T]oday, public television is the primary source of educational children’s programming in the United States, broadcasting over 1,200 hours of children’s educational programming for home viewing.”<sup>47</sup> Even Peggy Charren said so:

I’d like to take this opportunity to say, and it’s a nice thing to be able to say at this hearing, that I think public broadcasting is a major national resource... I think they have done an extraordinary job of serving children and me.<sup>48</sup>

Cable networks like The Discovery Channel, the History Channel, The Learning Channel, and others provide a steady diet of educational programming. Nickelodeon offers educational and informational children’s programming. Similarly, Turner Broadcasting System, Inc. (“TBS”) properly touts its record:

TBS has been at the forefront of creating and providing viewers with educational programming designed to serve children’s needs. As part of its children’s programming efforts, TBS provides daily children’s programming on its cable program service TNT, including *Fraggle Rock* and *The Muppets*. TNT also has aired several children’s programming specials, such as *Dr. Seuss The Butter Battle Book* (produced by TNT), *Horton Hears a Who*, and *The Grinch Who Stole Christmas*. TBS SuperStation also provides regularly scheduled children’s viewing fare, including *Captain Planet*, an animated weekly half-hour series addressing environmental issues, and information segments for children entitled *Kid’s Beat*.<sup>49</sup>

A cursory review of any television listings would reveal that quality educational programming is only a short graze away in most television households. Alternatively, a shelf laden with educational and informational children’s programming (*e.g.*, *National Geographic* specials) awaits consumers

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<sup>46</sup>Tr. at 170.

<sup>47</sup>*Report and Order*, 6 FCC Rcd 2111, ¶30, n.97 [hereinafter cited as *91 R&O*].

<sup>48</sup>Tr. at 135.

<sup>49</sup>Comments of Turner Broadcasting System, Inc., MM Docket No. 90-570 (filed January 30, 1991) at 1-2.



only a few blocks away at a nearby video store. In short, broadcast television no longer is the only source of educational and informational children's programming.

This is neither a surprise nor a mystery. Jonathan Rogers, president of the CBS Television Stations Division reminded the Commission that:

Substantial amounts of educational and informational children's programming is already available in the video marketplace as a result of normal economic incentives. It is no accident, for example, that much high quality children's programming is found on Public Broadcasting Service, the Nickelodeon cable network and on the Disney channel.<sup>50</sup>

Commissioner Quello likewise has concluded that:

[A] "marketplace failure" in children's programming is a farcical notion in today's multichannel, multi-faceted era and represents only the viewer's failure to locate desired programs. The public has many diverse sources of programming, including children's programming, to choose from.<sup>51</sup>

Thus, these various noncommercial and nonbroadcast video services currently offer a generous menu of educational and informational children's programming.<sup>52</sup>

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<sup>50</sup>Tr. at 163.

<sup>51</sup>Commissioner Quello's Remarks at 4, 9.

<sup>52</sup>INTV must note with concern that TCI Cablevision of Oregon, Inc., seems intent on undermining the Act. Under the guise of helping parents to "channel kids toward more wholesome TV fare," TCI of Portland is selling "a special, child friendly remote control designed to limit children's viewing choices to age-appropriate channels." The remotes are a Remote-A-Saurus<sup>TM</sup> and Channel-Rover<sup>TM</sup>. The preprogrammed channels include "The Disney Channel, Nickelodeon, The Discovery Channel, and a local PBS affiliate, plus at least one button left free for local customization by the customer." Such devices, cute and "upbeat" as they may be have great capacity to frustrate the operation of the Act by discouraging, if not preventing, children from tuning to educational and informational programming on broadcast stations. See TCI news release of October 2, 1995, attached hereto as Exhibit C.